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No. 90-905



# In the Supreme Court of the United States

OCTOBER TERM, 1990

HAROLD FRIEDMAN and ANTHONY HUGHES, PETITIONERS

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
*Solicitor General*
ROBERT S. MUELLER, III
*Assistant Attorney General*
RICHARD A. FRIEDMAN
*Attorney*

*Department of Justice*
*Washington, D.C. 20530*
*(202) 514-2217*

## QUESTIONS PRESENTED

1. Whether there was a constructive amendment of the indictment or a prejudicial variance between the indictment and the prosecution's theory of the case.

2. Whether the RICO statute's requirement of a pattern of racketeering activity is unconstitutionally vague as applied to the facts of this case.

## TABLE OF CONTENTS



## TABLE OF AUTHORITIES

Cases:

Cases—Continued:



Constitution and statutes:

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### OPINIONS BELOW

The court of appeals' opinion (Pet. App. A3-A4) is unreported, but the judgment is noted at 908 F.2d 974. The pertinent opinion of the district court (Pet. App. A17-A33) is not reported.

### JURISDICTION

The judgment of the court of appeals was entered on July 26, 1990. A petition for rehearing was denied on September 10, 1990. The petition for a writ of certiorari was filed on December 10, 1990 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

After a jury trial in the United States District Court for the Northern District of Ohio, both petitioners were convicted of conducting the affairs of an enterprise through a pattern of racketeering activity (Count 1), in violation of 18 U.S.C. 1962(c); conspiring to conduct the affairs of an enterprise through a pattern of racketeering activity (Count 2), in violation of 18 U.S.C. 1962(d); and embezzling union funds (Count 4), in violation of 29 U.S.C. 501(c). In addition, petitioner Friedman was convicted of filing a false Labor Organization Report (Count 6), in violation of 29 U.S.C. 439. Petitioner Friedman was placed on probation for four years, fined $35,000, and ordered to forfeit his labor union positions. Petitioner Hughes was placed on probation for four years, fined $30,000, and ordered to forfeit his labor union positions. The court of appeals affirmed.

1. The evidence at trial is described in the government's brief in the court of appeals. Petitioner Friedman and co-defendant Jackie Presser[1] were president and secretary-treasurer, respectively, of Local 507 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America. Friedman also was president of Local 19 of the Bakery, Confectionery and Tobacco Workers International Union, AFL-CIO. Petitioner Hughes was first a business agent and then recording secretary of Local 507 and was paid as a business agent of Local 19. Both Friedman and Hughes, as union officers and employees, had a fiduciary responsibility to use union funds and property "solely for the benefit of [each Local] and its members." 29 U.S.C. 501(a). Gov't C.A. Br. 3.

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[1] Presser died on July 9, 1988, prior to trial.

Both Locals employed a number of business agents. Working together in pairs, the agents spent most of their time visiting union shops and meeting with union members regarding the members' problems. Petitioner Friedman supervised the business agents, instructed them on their duties, routinely conferred with them about union matters, and required them to maintain records regarding their activities. Friedman also was responsible for filing Local 19's Labor Organization Annual Report, Form LM-2, with the U.S. Department of Labor. Friedman signed and attested to the truth of the LM-2 reports filed by Local 19 from 1977 through 1981. Those LM-2 reports stated that petitioner Hughes was employed as a business agent by Local 19 and was paid a salary of $26,000 in 1977, 1979, 1980, and 1981, and $26,500 in 1978. Gov't C.A. Br. 4-9.

The government's evidence demonstrated that Hughes actually performed none of the customary functions of a business agent and did little or no other work for Local 19. Other Local 19 business agents testified that Hughes never worked with them in visiting union shops between 1977 and 1981 and that they never saw him perform the duties of a business agent. Forty-five employers of employees represented by Local 19 testified that they had no dealings with Hughes concerning the Local during that period. Voluminous union records reflecting thousands of meetings and appearances involving business agents contained no mention of Hughes; other records reflected that he was present at 2 out of 376 meetings of Local 19's membership or governing bodies. During the period that Hughes was paid as a business agent, Hughes and Presser's wife were co-owners of a restaurant, where Hughes worked five to seven days a week, typically from 11:00 a.m. to 2:00 p.m. and 6:00 p.m. to 10:00 p.m. Gov't C.A. Br. 6-9.

The evidence likewise showed that George Argie received a business agent's salary from Local 507—in the form of

checks signed by petitioner Friedman—during a period in which he performed little or no work for that Local. From August 7, 1978, to June 1, 1979, he collected $17,600. Argie, a childhood friend of Presser's, was hired by Presser in 1978. Argie testified that he had no prior union experience. For the preceding ten years, he had been a gambler; he was convicted of a gambling-related offense approximately four months before he was hired by Presser. Argie testified that he did not know the duties of a business agent and that he did not have any specific duties. Argie's time at Local 507's offices was typically spent in conversation with Presser or Hughes, or, if Presser was not there, reading magazines. During Argie's employment at Local 507, he never gave Presser any advice regarding union matters, never visited union shops with the business agents, never collected union dues money, and did not have a union car or union credit card. Telephone calls were never referred to him at the union offices. Testimony of other business agents and 23 employers, as well as union records, confirmed that Argie had not performed the services of a business agent. Gov't C.A. Br. 9-11.

The theory of the defense was that Argie and Hughes had actually performed some work for the union. The government impeached evidence offered to support this theory and argued that any work actually performed was *de minimis* in nature. See Gov't C.A. Br. 18-23.

2. a. The substantive RICO count of the indictment charged that Presser, Friedman, and Hughes, together with Locals 507 and 19 and the affiliated pension and benefit plans of those Locals, constituted a RICO "enterprise" within the meaning of 18 U.S.C. 1961(4), and that petitioners and Presser had conducted the affairs of that enterprise through a pattern of racketeering activity involving multiple acts of embezzlement of union funds. C.A. Joint App. 70-71. The conspiracy count charged the same de-

fendants with conspiring to commit that offense. *Id.* at 88-89. The racketeering acts on which the RICO convictions were based were an embezzlement by Friedman of $8,000 in union funds paid to Argie from January to June 1979 (racketeering act 20), an embezzlement by Hughes and Friedman of $26,500 in union funds paid to Hughes during 1978 (racketeering act 22), and an embezzlement by Friedman and Hughes of $17,000 in union funds paid to Hughes during 1981 (racketeering act 26). *Id.* at 84-85, 87, 89. See Pet. App. A332-A341. Friedman and Hughes were convicted on a count charging them with violating 29 U.S.C. 501(c) by embezzling that $17,000, and Friedman was convicted on a count charging that he had submitted an LM-2 report for Local 19 that falsely represented that Hughes received a "salary" of $26,000 as an "employee" and "business agent" of Local 19. C.A. Joint App. 93-94, 96-97.

b. After the jury returned its verdicts on those counts, petitioners moved for judgments of acquittal and for a new trial. Among other things, they claimed that they had been prejudiced by a constructive amendment of the indictment and by a variance between the evidence and the indictment. In particular, they argued that the indictment charged that Hughes and Argie performed no work at all for their respective Locals, while the evidence, the government's argument, and the jury instructions resulted in a conviction based on the theory that the two had performed some work, but not enough to justify their salaries. The district court rejected that claim. Pet. App. A28-A33.

The district court first determined that "a fair reading of the language at issue does not mandate the conclusion that the ghosts are alleged to have performed absolutely 'no work'." Pet. App. A30. The language on which petitioners relied, the court explained, "can just as easily be read as alleging that the employees did not work in a general sense." *Ibid.*

In the alternative, the district court addressed petitioner's constructive amendment and prejudicial variance claims on the assumption that the "indictment language did amount to an absolute 'no work' allegation." Pet. App. A30. The court concluded that there had been no constructive amendment of the indictment since any no-work allegation "did not pertain to an element of the charges" and was "mere surplusage." Pet. App. A31 (citing *United States* v. *Miller*, 471 U.S. 137 (1985)). With respect to the variance claim, the court concluded that petitioners had failed to establish that they had been prejudiced by evidence that Hughes and Argie had performed *de minimis* work, as opposed to no work at all. Pet. App. A32. In light of various pretrial proceedings, the court concluded, "all parties were clearly aware from the start of the case that the amount of work done by the employees in question would be a critical issue." *Ibid.* The court also found that defendants had received notice of that issue from discovery materials provided to them by the government and from the prosecutor's opening statement. *Ibid.*

3. The court of appeals affirmed in an unpublished per curiam opinion that incorporated the district court's reasoning. Pet. App. A3-A4.

## ARGUMENT

1. Petitioners first combine two related contentions: (a) that 29 U.S.C. 501(c) requires proof that a union has derived no benefit at all from an expenditure of union funds (Pet. 17-23) and (b) that petitioners were convicted on a prosecution theory—that Argie and Hughes had performed insufficient work to justify their salaries—that was not charged in the indictment (Pet. 11-17). These contentions present no question warranting this Court's review.

a. Section 501(c) penalizes "[a]ny person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use, or the use of another, any of the moneys, funds, securities, property, or other assets of a labor organization of which he is an officer, or by which he is employed, directly or indirectly." In *United States* v. *Bane*, 583 F.2d 832, 835-836 (1978), cert. denied, 439 U.S. 1127 (1979), the Sixth Circuit held that when such a taking is in the form of an expenditure of union funds that is "authorized" by the union's constitution and by-laws, as petitioners contend the employment of "business agents" was in this case, the government must prove that "the defendant had a fraudulent intent to deprive the union of its funds" and "lacked a good faith belief that the expenditure was for the legitimate benefit of the union." Accord *United States* v. *Gibson*, 675 F.2d 825, 828 (6th Cir.), cert. denied, 459 U.S. 972 (1982); *United States* v. *Dixon*, 609 F.2d 827, 829 (5th Cir. 1980); see generally *United States* v. *Floyd*, 882 F.2d 235, 239 (7th Cir. 1989). The jury was instructed in accordance with this interpretation of Section 501(c). Gov't C.A. Br. 15. In this case, therefore, the jury found that petitioners lacked a good faith belief that the salaries paid to Hughes and Argie were for the legitimate benefit of the union.

As *Bane* noted, obligating the government to prove that an expenditure made with fraudulent intent has in fact conferred no benefit whatever on a union would narrow the statute in a manner inconsistent with its language and purpose: "To require such proof could absolve a defendant of liability when an otherwise fraudulent appropriation of funds fortuitously had some beneficial effect upon the union. Such a requirement would also be inconsistent with the strict fiduciary duty imposed upon union officials by § 501." 583 F.2d at 836.

Contrary to petitioner's suggestion (Pet. 18-22), there is no conflict among the circuits on that issue. The majority

opinion on Section 501(c) in *United States* v. *Silverman*, 430 F.2d 106, 126-127, modified on other grounds, 439 F.2d 1198 (2d Cir. 1970), cert. denied, 402 U.S. 953 (1971), did not hold that proof of the absence of union benefit is essential to a violation of that Section. Rather, the *Silverman* majority "accepte[d] *arguendo*" that a conviction under the statute "may be made out by a demonstration of a fraudulent intent to deprive the union of its funds and either a lack of bona fide authorization or an absence of benefit to the labor organization from the expenditure" and found insufficient evidence to sustain the defendant's conviction. *Ibid.* Subsequent decisions of the Second Circuit indicate, consistent with *Bane*, that the "central question" in a Section 501(c) prosecution is whether the union official who has expended union funds had the requisite criminal intent; rather than representing an element of the offense, the presence or absence of actual benefit to the union goes to the defendant's intent. See *United States* v. *Ottley*, 509 F.2d 667, 671 (1975); *United States* v. *Santiago*, 528 F.2d 1130, 1133-1134, cert. denied, 425 U.S. 972 (1976). There is no reason to suppose that the Second Circuit would read its precedents to mandate a judgment of acquittal on the facts of this case.[2]

b. The paragraphs of the indictment that actually charged petitioners with violations of Section 501(c) did not purport to limit the government to the theory that the local unions had derived absolutely no benefit from the salaries paid to Argie and Hughes. Instead, those paragraphs of the indictment tracked the statute and identified the par-

[2] Petitioners cite a number of other decisions interpreting Section 501(c) in a variety of factual situations. Pet. 19-20. But petitioners make no attempt to show that those interpretations, applied to this case, would result in reversal of their convictions or that those decisions conflict with one another in any significant respect. There is no force, therefore, to petitioner's suggestion "that the elements of 501(c) should be delineated by this Court" in this case. Pet. 20.

ticular payments involved.[3] In suggesting that the indictment restricted the government to the theory that Argie and Hughes performed no work whatever, petitioners rely on allegations in the RICO counts illustrating the "manners and means of conducting the affairs of the enterprise" charged in those counts. Those paragraphs charged that Presser and Friedman had made payments to various individuals, including Hughes and Argie, knowing that those individuals "failed to perform work on behalf of" the locals and had concealed the illegality of those payments by submitting false LM-2 reports regarding employees who were "not performing the services and duties of a business agent." C.A. Joint App. 6-9.

On their face, these allegations did not purport to restrict the government to a theory that *Bane* had expressly rejected as an unjustifiably narrow interpretation of the statute. The statements that Argie and Hughes "failed to perform work" for the union and that they were "not performing the services and duties of a business agent" were simply allegations that the employees were not working in the general sense—*i.e.*, performing the customary functions of business agents. Those allegations did not suggest that the RICO counts

[3] Count 4 is representative. It charged (C.A. Joint App. 93):

> From on or about May 16, 1981 through on or about December 31, 1981, the exact dates being to the Grand Jury unknown, in the Northern District of Ohio, Eastern Division, the Defendant, HAROLD FRIEDMAN, while an officer and an employee, that is President of the Bakery, Confectionery and Tobacco Workers International Union, AFL-CIO, Local 19, a labor organization engaged in an industry affecting commerce as defined by Section 402(i) and (j) of Title 29, United States Code, and the defendant ANTHONY HUGHES unlawfully and willfully did embezzle, steal, abstract, and convert to the use of HAROLD FRIEDMAN and the use of another, that is ANTHONY HUGHES, the sum of $17,000 more or less, of the money and funds of Local 19.
>
> All in violation of Title 29, United States Code, Section 501(c), and Title 18, United States Code, Section 2.

would be fatally undercut by evidence that, during periods in which Argie and Hughes were paid thousands of dollars from union funds, they occasionally provided some nominal service to the union.[4]

In any event, as the district court held, those allegations were surplusage with respect to the Section 501(c) violations charged in separate sections of the indictment. On their face, the allegations on which petitioners rely only described actions that were "[a]mong the means whereby [petitioners] and others conducted and participated in the affairs of the enterprise" charged in the RICO counts. C.A. Joint App. 71. Those allegations were not essential even to that element of the RICO count; they certainly did not limit the theory of the prosecution with respect to violations of Section 501(c) charged as predicate acts or as substantive offenses. See *United States* v. *Miller*, 471 U.S. 130, 135 (1985) (when proof corresponds with the elements of an offense

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[4] Petitioners also cite government memoranda in opposition to motions for bills of particulars in which, they contend, the government limited itself to a no-work theory. Pet. 8-9. The statements on which petitioners rely, however, were part of a general argument that the indictment provided sufficient details of the offenses charged; in advancing that contention, the government did not purport to supplement or narrow the allegations in the indictment itself. C.A. Joint App. 131-134, 164-166. Indeed, the government specifically advised the defendants that it was not required to prove that the unions had derived no benefit whatever from the phony business agents. The government opposed Presser's request for information on whether Local 19 derived any benefit from certain payments on the following ground, among others (*id.* at 140 n.6):

> [A]lthough it is true that actual benefit to the union is a factor for the jury's consideration, lack of actual union benefit is not an element which the government must prove. *See Bane*, 583 F.2d at 836.

Petitioners could not have been misled by the prosecution's memoranda as to the nature of the offenses charged.

alleged in the indictment, "[a] part of the indictment unnecessary to and independent of the allegations of the offense proved may normally be treated as 'a useless averment' that 'may be ignored'").

None of the cases on which petitioners rely (Pet. 13-17) supports reversal of their convictions. In *United States* v. *Smolar*, 557 F.2d 13, 18 (1st Cir.), cert. denied, 434 U.S. 971 (1977), the indictment charged that the defendants had sold securities having "little if any value" to a mutual fund they controlled. At trial, however, there was no evidence that the securities were of nominal value, and the government sought a conviction on the theory that the defendants had breached their fiduciary obligations to the fund. The court held that "the distinction between outright fraud as charged in the indictment and a breach of fiduciary duty cannot be dismissed as insignificant." *Ibid.* Similarly, in *United States* v. *Varoz*, 740 F.2d 772, 775 (10th Cir. 1984), the court found a prejudicial variance between an indictment charging that a podiatrist had submitted a claim for surgery that had not been performed and evidence that the surgery had been performed but was unnecessary. This case involves no shift in the theory of prosecution comparable to those in *Smolar* and *Varoz*.

Finally, in *United States* v. *Marolda*, 615 F.2d 867 (9th Cir. 1980), the indictment charged that a union official violated Section 501(c) by expending union funds "without proper authorization and without benefit to said Local." 615 F.2d at 868 n.2. Without determining whether both of those allegations were essential to a conviction under Section 501(c), the court in *Marolda* held that the government was bound by *Ex parte Bain*, 121 U.S. 1 (1887), to prove them both. 615 F.2d at 870-871. Since *Marolda* was decided, however, *Ex parte Bain* has been overruled to the extent that it suggested "that it constitutes an unconstitutional amendment to drop from an indictment those allegations

that are unnecessary to an offense that is clearly contained within it." *United States* v. *Miller*, 471 U.S. at 144. Thus, to the extent that *Marolda* suggests that the government can be required to prove allegations unnecessary to offenses that are charged in the indictment, it no longer remains good law.

Here, the indictment clearly charged the Section 501(c) violations on which petitioners were convicted; allegations in the RICO counts illustrating the means by which petitioners conducted the affairs of their enterprise were unnecessary to those offenses and could thus be disregarded. Moreover, as the district court held, any variance between the allegations and the proof did not prejudice petitioners in their preparation or at trial. Pet. App. A32-A33.

3. Finally, petitioners argue (Pet. 24-27) that the RICO "pattern" requirement is unconstitutionally vague on its face and as applied to them. That question is not properly presented by this case. Petitioners did not preserve this issue in the district court, see Gov't C.A. Br. 27, and the court of appeals did not address it, see Pet. App. A4.[5]

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[5] In any event, the statute was not vague as applied to petitioners' conduct – the pertinent question raised by a vagueness claim that does not involve an alleged infringement of a First Amendment right. See *Village of Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494-495 (1982). As this Court has held, a pattern of racketeering activity exists if the predicate acts have "the same or similar purposes, results, participants, victims, or methods of commission." *H.J. Inc.* v. *Northwestern Bell Telephone Co.*, 109 S. Ct. 2893, 2901 (1989). The three racketeering acts established here each involved embezzlement by union officials who used their positions in the enterprise to embezzle union funds by paying salaries to employees who performed little or no work for the union.

## CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

KENNETH W. STARR
*Solicitor General*
ROBERT S. MUELLER, III
*Assistant Attorney General*
RICHARD A. FRIEDMAN
*Attorney*

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